Supreme Court, U.S.
FILED
AUG 17 1998
OFFICE OF THE CLERK

No. 98-95

In The
Supreme Court Of The United States

October Term 1997

KEY BANK NATIONAL ASSOCIATION f/k/a
KEY BANK OF NEW YORK,
Petitioner,

v.

RONALD P. MILHAM, BENEDETTA MILHAM
AND ANDREA E. CELLI,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Martin J. Goodman
Counsel for Respondents
Ronald P. Milham and Benedetta Milham
350 Northern Boulevard
Albany, New York 12204
(518) 449-7777

QUESTION PRESENTED

Is an oversecured creditor entitled to be paid its contract rate of interest post-confirmation, even if payment of that rate of interest will enable the creditor to receive more than the present value of its claim as of the effective date of the plan?

TABLE OF CONTENTS

Section	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. *U.S. v. Ron Pair* precludes an interpretation of 506(b) that mandates contract rate of interest after confirmation	4
II. *Rake v. Wade* defines the limited scope of §506(b)	6
III. Congress considered and rejected an amendment which would require the payment of interest at the contract rate	7
IV. The number of oversecured claims is declining, not increasing	9
V. *Milham* and *Smithwick* agree that §1325(a)(5)(B)(ii) controls post-confirmation	11
VI. A decision by the U.S. Supreme Court in this case could very well be mooted by revisions to the Bankruptcy Code	13

VII. The *Milham* case has been converted to one under Chapter 7, and the issue could very well be considered to be moot.....14

CONCLUSION.....15

APPENDIX

Trustee's report of disbursements to Key Bank.....A

Notice of Conversion.....B

TABLE OF AUTHORITIES CITED

I. Federal Statutes

11 U.S.C. 506(b).....4, 5, 6, 11, 12

11 U.S.C. 1307(a).....2

11 U.S.C. 1322(b)(2).....14

11 U.S.C. 1322(e).....7

11 U.S.C. 1325(a)(5)(b)(ii)..3, 6, 11, 12, 14

II. Supreme Court Cases

U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989).....4, 5

Rake v. Wade, 113 S.Ct. 2187 (1993).....6

III. Court of Appeals Cases

In re Milham, 141 F.3d 420 (2nd Cir. 1998).....1, 4, 11

Smithwick v. Green Tree Financial Servicing Corp., 121 F.3d 211, at 213 (5th Cir. 1997), *cert. denied*, __ U.S.__;, (U.S. Sup. Ct., No. 97-1333, 4/20/98) U.S. LEXIS 2552).....11

IV. Bankruptcy Appellate Panel for the Second Circuit Cases

In re Harko, 211 B.R. 116 (2nd Cir.BAP 1997).....1

V. Bankruptcy Court Cases

Green Tree Financial Servicing v. Smithwick, 1202 B.R. at 420 (S.D.Tex.1996).....8

In re Collins, 167 B.R. 842 (E.D.Tex.1994)...8

VI. Other Authorities

Consumer Reports, v.60, no.4 (Cons. Union, 1995).....9

Consumer Reports, v.61, no.4 (Cons. Union, 1996).....10

Consumer Reports, v.62, no.4 (Cons. Union, 1997).....9, 10

H.R. 4786, 97 Cong. 1st Sess. 19(2)(A) 1981.....7

King, L., 3 Collier on Bankruptcy (15th ed. 1993).....6

King, L., 5 Collier on Bankruptcy (15th ed. 1995).....8

Pawlowic, Dean, "Entitlement to Interest Under the Bankruptcy Code," 12 Bankr.Dev.J. 149 (Emory Univ. School of Law 1995).....6

Ponoroff, L. & Knippenberg, S., "The Immovable Object Versus The Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy," 95 Mich. L. Rev. 2235 (Mich. Univ. School of Law 1997).....13

STATEMENT OF THE CASE

A. Procedural History

This brief responds to a petition filed on July 8, 1998, and docketed July 17, 1998, that seeks leave to appeal from the final order of the U.S. Circuit Court of Appeals for the Second Circuit, filed on April 10, 1998, reported under the title ***In re Milham***, 141 F.3d 420 (2d Cir.1998), which unanimously affirmed the final order of the Bankruptcy Appellate Panel Service of the Second Circuit entered on July 31, 1997, officially reported under the title of ***In re Harko***,[1] 211 B.R. 116 (2nd Cir.BAP 1997), which affirmed the final order of the Hon. Robert E. Littlefield, Jr., entered in the United States

---

[1]***In re Milham*** was decided along with a companion case, ***In re Harko***, in the bankruptcy court and in the appeal to the BAP. The combined cases are reported under the name ***In re Harko***.

Bankruptcy Court for the Northern District of New York, confirming the Chapter 13 plan of the respondents over the objection of the petitioner herein.

Pursuant to the confirmed plan, Key Bank was paid in full as of February 20, 1997.[2] On June 1, 1998, under extreme financial hardship caused by the loss of employment, the case was converted to one under Chapter 7 pursuant to §1307(a).[3]

B. The Facts

Ronald and Benedetta Milham and Key Bank entered into a retail installment contract on December 11, 1992, secured by a 1991 Lincoln automobile. The debtors filed for relief under Chapter 13 of the Bankruptcy Code on April 24,

---

[2]Trustee's disbursement report at Appendix "A."

[3]Notice of conversion at Appendix "B."

1996.

In their Chapter 13 plan, the Milhams proposed to pay the secured claim of the bank by paying the close-out balance of the loan at 8.5% annual interest.

Key Bank filed an objection to the plan, claiming that because its loan was oversecured, it was entitled to the contract rate of 9.5% interest over the life of the plan.

The Milham's response was that from the date of filing up to the effective date of the plan, the rate of interest was determined under §506(b), and that from the effective date of the plan onward, the bank was entitled to present value under §1325(a)(5)(B)(ii).

The Milhams and the bank agreed that the value of the collateral exceeded the balance due on the loan.

REASONS FOR DENYING THE WRIT

I.
U.S. v. Ron Pair precludes an interpretation of 506(b) that mandates contract rate of interest after confirmation.

11 U.S.C. 506(b)

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, **interest on such claim,** and any **reasonable fees, costs, or charges provided for under the agreement under which such claim arose.**

(Emphasis added).

§506(b) does not say that an oversecured creditor collects interest at the contract rate. ***Milham, supra***, at 2512. In ***U.S. v. Ron Pair Enterprises, Inc.***, 489 U.S. 235 (1989), the Supreme Court, applying principles of statutory and grammatical construction, asserted that the phrase "provided for under the agreement under which claims arose" does not qualify the phrase

"interest on such claim." ***Id.***, at 241-242.

In concluding that the comma after "interest on such claim" effectively separates it from the phrase "provided for under the agreement," the Court precluded an interpretation of §506(b) which would statutorily mandate the contract rate of interest.

II.
Rake v. Wade defines the limited scope of §506(b).

The Supreme Court took cognizance of the limited application of §506(b): "It is generally recognized that the interest allowed by §506(b) will accrue until payment of the secured claim or until the effective date of the plan. "***Rake v. Wade***, 113 S.Ct. 2187 (1993) at 2190, citing King, L., 3 Collier on Bankruptcy ¶506.05, at 506-43 and n. 5c (15th ed. 1993). In setting forth the scope of §506(b), ***Rake*** addressed the requirements for pendency and plan interest and how §506 and §1325 interrelate. Pawlowic, Dean, "Entitlement to Interest Under the Bankruptcy Code," 12 Bankr.Dev.J. 149 (Emory Univ. School of Law 1995), at 159.2.

III.
Congress considered and rejected an amendment which would require the payment of interest at the contract rate.

The reluctance of Congress to grant special status for oversecured claims is demonstrated in its failure to provide for special status in the Bankruptcy Code of 1978 and again in 1981, when Congress refused to revise the Code to require payment of contract interest in Chapter 13. Legislation was proposed in 1981 to require "Interest ...to be paid at the rate specified in the consumer's contract," but was never enacted. H.R. 4786, 97 Cong. 1st Sess. 19(2)(A) 1981. In 1994, Congress added §1322(e) to provide for contract rate of interest on oversecured mortgage arrears, but did not provide this preferential treatment for any other class of secured creditors.

"Congress considered and rejected an

amendment which would require the payment of interest at the contract rate for present value purposes." ***Green Tree Financial Servicing v. Smithwick***, 1202 B.R. at 423 (S.D.Tex.1996), *citing* ***In re Collins***, 167 B.R. at 845 n. 4. "Contrary to the holdings of a number of courts, it is rarely appropriate to select the rate charged the debtor in the original transaction as the present value discount rate." ***Smithwick, supra,*** *citing* 5 Collier on Bankruptcy, ¶1235.06 at 1235.51 (15th ed.1995).[4]

---

[4]This writer located the passage *cited* at 5 Collier on Bankruptcy, ¶1325.06[3][b] at 1325.36 (15th ed.1995).

IV.
The number of oversecured claims is declining, not increasing.

Although petitioner claims that the number of oversecured claims is increasing, it offers no evidence to support this claim, and it is the opinion of this writer that oversecured claims are as much in the minority as ever.

There is reason to believe that the number of oversecured claims is declining with the rapid emergence of leasing as an alternative to the purchase of a motor vehicle.

In 1987, 7% of new automobiles were leased. Consumer Reports, v.62, no.12, at 30 (Dec.97). The percentage of automobiles rolling off assembly lines and into leases increased to 10% in 1990. Consumer Reports, v.60, no.4, at 268 (Apr.95). By 1995, the percentage of leased vehicles rose to 25%. ***Id***. In 1996 the percentage

of leased automobiles increased to 30%. Consumer Reports, v.61, no.4, at 58 (Apr.96). And by 1997, the percentage increased to 33%. Consumer Reports, ***supra***, v.62, no.12, at 30.

V.
Milham **and** ***Smithwick*** **agree that §1325(a)(5)(B)(ii) controls post-confirmation.**

Milham and ***Smithwick*** do not conflict to the degree suggested by petitioner. ***Milham, supra,*** *at 2512-15,* provides for §506(b) interest until confirmation and §1325(a)(5)(B)(ii) present value subsequent to confirmation.

The decision in ***Smithwick v. Green Tree Financial Servicing Corp.***, 121 F.3d 211, at 213 (5th Cir. 1997), *cert. denied*, __U.S.__; (U.S. Sup. Ct., No. 97-1333, 4/20/98) U.S. LEXIS 2552), likewise provides for §1325(a)(5)(b)(ii) interest subsequent to confirmation, adding the rebuttable presumption, wholly judge-made, that the contract rate is the proper rate of §1325(a)(5)(B)(ii) interest. ***Smithwick*** does not support petitioner's position of entitlement to the contract rate as an absolute under §506(b).

The decision does not suggest, as petitioner claims, that §506(b) overcomes §1325(a)(5)(B)(ii).[5]

---

[5]Petition for Writ at 10.

VI.

A decision by the U.S. Supreme Court in this case could very well be mooted by revisions to the Bankruptcy Code.

Legislation is pending in Congress to extensively revise the Bankruptcy Code. There are three competing bills in the House,[6] and one bill in the Senate.[7] Moreover, there are those who urge Congress to "clarify once and for all the nature and status of...secured claims in bankruptcy." Ponoroff, L. & Knippenberg, S., "The Immovable Object Versus The Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy," 95 Mich. L. Rev. 2235 (Mich. Univ. School of Law 1997).

The final version of bankruptcy reform legislation could moot the decision of the Court should certiorari be granted.

---

[6]H.R. 2500, H.R. 3146 and H.R. 3150.

[7]S. 1301.

VII.

The *Milham* case has been converted to one under Chapter 7, and the issue could very well be considered to be moot.

On February 20, 1997, pursuant to the order of confirmation, the Trustee disbursed the final payment to Key Bank.[8] Under extreme financial hardship caused by the loss of employment, on June 1, 1998, pursuant to §1307(a), the Milhams converted their case from one under Chapter 13 to one under Chapter 7.[9]

The conversion removes the case from consideration under §1322(b)(2) and §1325(a)(5)(B)(ii), so that the issue raised could be considered to be moot.

---

[8]Appendix "A," *supra*.

[9]Appendix "B," *supra*.

CONCLUSION

The ***Milham*** case was properly decided at all levels, and should not be reconsidered.

96-12157 RONALD P. MILHAM & BENEDETTA MILHAM

D a t e	Code	Creditor Name	Cred	Cle	ID	Amount	Check No
Oct 18, 1996	CR	S-KEY BANK	021523	0002	T99	990.18	40225183
Oct 18, 1996	INT	S-KEY BANK	021523	0002	T99	112.83	40225183
Nov 25, 1996	CR	S-KEY BANK	021523	0002	T99	1,284.27	40226537
Nov 25, 1996	INT	S-KEY BANK	021523	0002	T99	15.39	40226537
Dec 16, 1996	CR	S-KEY BANK	021523	0002	T99	298.85	40227786
Dec 16, 1996	INT	S-KEY BANK	021523	0002	T99	6.86	40227786
Jan 21, 1997	CR	S-KEY BANK	021523	0002	T99	685.88	40229853
Jan 21, 1997	INT	S-KEY BANK	021523	0002	T99	4.75	40229853
Feb 20, 1997	CR	S-KEY BANK	021523	0002	T99	65.49	40230422
Feb 20, 1997	INT	S-KEY BANK	021523	0002	T99	.46	40230422
*** T O T A L ***						3,382.56	

Appendix "A"

BEST AVAILA

UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

In re

Ronald P. Milham and
Benedetta Milham,

Case No. 96-12157

Debtor(s).

NOTICE OF CONVERSION OF CASE TO CHAPTER 7 UNDER SECTION 1307(a)

The debtor(s), by their attorney, represents as follows:

1. The debtor(s) are no longer able to comply with their Chapter 13 plan and do not desire to modify the plan.

2. The debtor(s) qualify as debtor(s) under Chapter 7 of Title 11.

3. Under 11 U.S.C. 1307(a), the debtor(s) are entitled to convert their Chapter 13 case to a case under Chapter 7 at any time, and the debtor(s) now wish to convert this Chapter 13 case to a case under Chapter 7.

4. A copy of this Notice has on this date been mailed to the Chapter 13 Trustee serving in the case.

WHEREFORE, the debtor(s), under Bankruptcy Rules 1017(d) and 9011, hereby give notice of the conversion of this Chapter 13 case to a case under Chapter 7 of Title 11, United States Code.

Dated: June 1, 1998

Ronald P. Milham

Benedetta Milham

Martin J. Goodman
Attorney for Debtor(s)
150 Northern Blvd.
Albany, New York 12204
(518) 449-7777

Appendix "B"

BLE COPY